No. 807

In the

Supreme Court of the United States

OCTOBER TERM, 1970

O. W. DONALD,

Petitioner,

v.

ZACK MEYER'S T.V. SALES & SERVICE and MOORE BUSINESS FORMS, INC.,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT MOORE BUSINESS FORMS, INC.

Statement

The "Statement of the Case" in the Petition recites several supposed "facts" which are erroneous or which are completely without foundation in the record. These need not be belabored here, however — for the facts of this case are fully and accurately stated in the opinion of the court below (reported at 426 F. 2d 1027).

Reasons for Denying the Writ

This case presents nothing worthy of review by this Court. It consists only of the claims of a disgruntled individual whose purported copyright was held invalid — claims which, despite the assertions of the Petition, plainly have no consequence beyond the particular facts and the immediate parties to this litigation.

The petitioner, O. W. Donald, claimed a copyright on a single paragraph which was "nothing more than an ordinary conditional sales contract or chattel mortgage agreement" (426 F. 2d at 1029) . . . which was "printed at the bottom of standard invoice forms which Donald printed and sold to television dealers and repairmen" (426 F. 2d at 1028) . . . and which was the very same type of contract "published in numerous form books, many of which are themselves copyrighted" (426 F. 2d at 1029).

The court of appeals, consequently, held that the supposed copyright was "invalid for lack of originality" because Donald's "Agreement" was only a trivial variation of prior works which were copyrighted or in the public domain (426 F. 2d at 1029-30). In so holding, the court explained:

> "Neither the existence of these earlier forms nor Donald's use of them, however, necessarily renders his paragraph ineligible for copyright protection. It is settled law that to obtain a valid copyright, as distinguished from a patent, the applicant need not show that the material in question is unique or novel; it need only be original. Gelles-Widmer Co. v. Milton Bradley Co., 7 Cir. 1963, 313 F. 2d 143, cert. denied, 373 U.S. 913; Alfred Bell & Co. v. Catalda Fine Arts, 2 Cir. 1951, 191 F. 2d 99. Thus a work may be protected by copyright even though it is based on a prior

> copyrighted work or something already in the public domain if the author, through his skill and effort, has contributed a *distinguishable variation* from the older works. * * *
>
> "* * * something more than merely refraining from outright copying is required before a new variation on an old work has sufficient originality to be copyrightable. *The author must add 'some substantial not merely trivial originality.'* Chamberlin v. Uris Sales Corp. 2 Cir. 1945, 150 F. 2d 512, 513. *The variation must be meaningful and must result from original creative work on the author's part.* * * *
>
> "In the case before us we search in vain for the requisite originality in plaintiff's 'Agreement.' The 'Agreement' contains nothing of substance which resulted from Donald's creative work. The order and arrangement of the subject matter in the 'Agreement' are identical with several forms suggested in prior works. See e.g., 11 Am. Jur. Legal Forms, § 1447 (1958). The word arrangement used, while not identical, is at most only a paraphrase of various portions of earlier forms * * *" (426 F. 2d at 1029-30) (emphasis added).

There is nothing novel or momentous about this holding. These established principles have been applied in numerous other cases and to various types of claimed copyrights — e.g., to arithmetic flash cards in *Gelles-Widmer Co. v. Milton Bradley Co.*, 313 F. 2d 143 (7th Cir. 1963), cert. denied, 373 U.S. 913 (1963); to mezzotint engravings of paintings by old masters in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99 (2d Cir. 1951); to a design for embroidered dresses in *Millworth Converting Corp. v. Slifka*, 276 F. 2d 443 (2d Cir. 1960); to the rules of a game entitled "Acey-Ducey" in *Chamberlin v. Uris Sales Corp.*, 150 F. 2d 512 (2d Cir.

1945); to a musical composition entitled "Tic Toc" in *Smith v. George E. Muehlebach Brewing Co.*, 140 F. Supp. 729 (W.D. Mo. 1956); and to maps in *Amsterdam v. Triangle Publications, Inc.*, 189 F. 2d 104 (3rd Cir. 1951).[1]

Therefore, the decision of the court of appeals below is manifestly correct. It is not in conflict with decisions of this Court or with decisions of other courts of appeal. And, most certainly, it does not involve any unsettled or novel question or any critical issue of federal law which would warrant review by this Court.

Moreover, not one of the "Questions Presented" stated in the Petition has any basis: *Contrary to question 1*, the decision below was not based solely upon the obvious fact that Donald's "Agreement" was merely a trivial variation of the copyrighted form appearing in 11 Am. Jur. Legal Forms § 1447 (1958); it is obvious from the above quotation that this form, § 1447, was used simply as an example of an "ordinary conditional sales contract" from one of the "numerous [legal] form books" (426 F. 2d at 1029). Of course, *contrary to question 2* — and to the unfounded assertion

[1] Other cases applying the "distinguishable variation" principles discussed in the above-quoted portion of the court of appeals opinion are cited in that opinion (426 F. 2d at 1029-30) and in the cases cited in this Brief.

[2] The court of appeals could well have referred to the 200 pages of chattel mortgage forms and clauses in 3 Am. Jur. Legal Forms §§ 511-808 (1953); to the 28 pages of conditional sales contracts and clauses in 11 Am. Jur. Legal Forms §§ 1446-1516 (1958); to the 63 pages of conditional sales and chattel mortgage forms and clauses in Stayton Texas Forms §§ 1914-1955 (1959); etc.

that the opinion below would invalidate "every copyrighted legal instrument, legal form and legal form book" (Petition, p. 3) — the court of appeals did not hold that legal forms were not copyrightable; instead, it specifically recognized that legal instruments and form books can be copyrighted (426 F. 2d at 1029).[3] And, *contrary to question 3*, the opinion below is not based upon some supposed test of originality peculiar to "map copyrights"; it simply holds that a trivial variation of prior copyrighted works is not subject to copyright because of lack of sufficient originality; and this established principle — as shown by the cases cited in this Brief and in the opinion below — is applicable not only to maps, but also to arithmetic flash cards, to dress designs, to game rules, to musical compositions, and to any other type of copyrighted material.

This Petition, therefore, is baseless. It presents only a private dispute — and a petty one, at that, since the total sales price of the invoices involved in the claimed infringement was only $72.50 (A. 28). No amount of verbiage or unfounded assertions about the meaning or effect of the opinion below can convert such a case into one which warrants review by this Court.

[3] For example, the court of appeals referred to the "numerous [legal] form books, many of which are themselves copyrighted," and it cited a case involving a "copyrighted" legal form (an insurance policy) in pointing out that, if the author of a legal instrument has contributed a "distinguishable variation" from prior copyrighted legal forms, "only those parts which are new are protected by the new copyright. Dorsey v. Old Surety Life Ins. Co., 10 Cir. 1938, 98 F. 2d 872" (426 F. 2d at 1029-30).

Conclusion

For these reasons, as well as those detailed in the opinion below, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that three copies of this Brief in Opposition for Respondent Moore Business Forms, Inc. were, on this 29th day of October, 1970, served by United States air mail, postage prepaid, upon each of the following: John C. Stahl, P.O. Box 13236, San Antonio, Texas 78213, attorney for Petitioner O. W. Donald; and Jack D. Maroney, Brown, Erwin, Maroney & Barber, 900 Brown Building, Austin, Texas 78701, attorney for Respondent Zack Meyer's T.V. Sales & Service.

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